80-1111

Supreme Court, U. S.
FILED
DEC 29 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

WING DING CHAN,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General's findings of facts passed the substantial evidence test in the denial of adjustment of status pursuant to Section 245(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1255(a) (1980).

(a) Whether the use of preconceived intent to remain in the United States permanently is a proper standard for the denial of the petitioner's application for adjustment of status to that of permanent resident.

(b) Whether the Attorney General has misconstrued the standard for determining the materiality of a fact concealed by an alien in applying for a visa.

2. Whether the Attorney General abused his discretion in denying petitioner's request for adjustment of status to that of a permanent resident.

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No.

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WING DING CHAN,

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vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Wing Ding Chan, the petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on August 4, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals was issued on August 4, 1980 and is appended hereto. The opinions of the

Board of Immigration Appeals, the Immigration Judge and the District Director of the Immigration and Naturalization Service constituting all of the administrative decisions in this case are also appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on August 4, 1980. No rehearing has been sought in the Court of Appeals. The application for extension of time to file a petition for a writ of certiorari on or before January 1, 1981 was granted by the Honorable Warren E. Burger, Chief Justice of the United States on October 28, 1980.

STATUTES INVOLVED

Immigration and Nationality Act of 1952, as amended:

"Section 106(a), 8 U.S.C. §1105(a)

Judicial Review of orders of deportation and exclusion.

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. §1031 *et seq.*, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that —

Determination upon administrative record

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive;

Section 245(a), 8 U.S.C. 1255(a)

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Administrative Procedure Act, 5 U.S.C.

Section 702. Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of relevant statutes, is entitled to judicial review thereof."

Code of Federal Regulations, 8 C.F.R.:

"Section 245.2(4) Decision.

> The applicant shall be notified of the decision and, if the application is denied, of the reasons therefore. No appeal shall lie from the denial of an application by the district director but such denial shall be without prejudice to the alien's right to renew his application in proceedings under Part 242 of this chapter. An application for adjustment of status under section 245 of the Act as a preference or nonpreference alien shall not be approved until an immigrant visa number has been allocated by the Department of State."

STATEMENT OF THE CASE

Petitioner Wing Ding Cha ("Chan") is a native and citizen of China. He first entered the United States as a crewman on April 2, 1968. He had remained in the United States until February 8, 1972. He surrendered himself to the Immigration and Naturalization Service and was permitted to leave for Hong Kong voluntarily at his own expense. During the period from 1968 to 1972, he worked as a Chinese specialty cook at various restaurants in California and New York. After returning to Hong Kong, he was employed by the Han Cheong Trading Company as an advertising promotion manager from March 1972 to December 1972. On December 11, 1972, he applied for a business visa at the American Consulate in Hong Kong. At the time of his visa application, one Ming Y. Chang, who knew English, helped him to fill out the application form. Petitioner was alleged to have stated on the form that he never previously applied for a visa. Petitioner had the intention to return to Hong Kong when he obtained the business visa on December 29, 1972 from the American Consul. Petitioner arrived in the United States on December 31, 1972. He contacted businessmen and did market research in San Francisco, New York and Washington, D.C. Three months after his arrival in the United States, the

Am-Chi Restaurant applied for a labor certification for the petitioner. Thereafter, on April 25, 1973, petitioner applied for permanent resident status pursuant to 8 U.S.C. §1255 (1980). His application was denied by the District Director of Immigration and Naturalization Service in Washington, D.C. on the ground that he willfully misrepresented material facts to the American Consul in Hong Kong on December 11, 1972 in that he failed to disclose his apprenticeship as a crewman, his voluntary departure and his desire to remain permanently in the United States.

On January 10, 1977, at a deportation hearing, the Immigration Judge affirmed the denial on the ground that he has a preconceived intent to remain here permanently, that he obtained experience as a cook while illegally in the United States and that he went to work shortly after arrival in the United States. His adjustment of status was denied and voluntary departure was entered in the order. Upon appeal, the Board of Immigration Appeals also denied the adjustment of status on the following grounds:

(a) The petitioner withheld information from the American Consul at the time he applied for a visa;

(b) That as crewman, he had deserted his vessel and remained here under different names until his departure in 1972;

(c) That he has no family ties in the United States.

On August 4, 1980, the Court of Appeals affirmed the decision of the Board of Immigration Appeals in denying the adjustment of status on the following grounds:

(a) That the Board's findings of facts passed the substantial evidence test;

(b) That the Board's exercise of discretion in the denial of adjustment is not an abuse of discretion.

This petition for certiorari has followed.

REASONS FOR GRANTING THE WRIT

1. The opinions of the Court of Appeals are in conflict in regard to an alien's eligibility for adjustment of status as a permanent resident when the Immigration and Naturalization Service charges that the alien has a preconceived intention to remain here permanently. *Ameeriar v. INS,* 438 F.2d 1028 (3d Cir.) (en banc), *cert. dismissed,* 404 U.S. 801 (1971); *Jain v. INS,* 612 F.2d 683 (2d Cir. 1979), *cert denied,* 100 S. Ct. 2155 (1980).

However, the District Court of Columbia Circuit in *Brownell v. Carijia,* 254 F. 2d 78 has held that even an alien in transit through the United States is eligible to apply for adjustment of status under Section 245 of the Act, and also in *Brownell v. Gutnayer,* 212 F. 2d 462, the D.C. Circuit reached the same result.

The conflict should be resolved by this Court for the important federal questions of Section 245 adjustment.

2. Section 245 of the Act does not make the alien's state of mind at the time of entry, namely, preconceived intent to remain here permanently as a requirement for denial of the adjustment of status. This factor was created by the administrative decisions and conflicting judicial opinions.

I.

There is insufficient evidence to support the finding that petitioner withheld a preconceived intent to remain in the United States permanently when he applied for his visa.

(a) At the time petitioner went to apply for a nonimmigrant visitor's visa for business at the U.S. Consulate in Hong Kong, he took a vacation with pay from the Han Cheong Trading Company where he had worked for ten months from March 1972 to December 1972; he did not quit his job. Petitioner intended to return to Hong Kong when he obtained a business visa on December 29, 1972.

Petitioner came to the United States to see American restaurant practices to be used in Hong Kong. He had a return ticket and brought $2,000 with him.

At the adjustment of status interview at the Immigration and Naturalization Service, petitioner did not fully understand the Cantonese interpreter's translation. Petitioner stated that when he obtained his visa, he planned to return to Hong Kong. He was then asked:

> "Q. Did you want to remain here permanently in the U.S.? A. Yes."

Petitioner speaks Fuchow and Mandarin which are different from the Cantonese language. He understood the interpreter to ask "Do you want to remain here permanently in the U.S.?"

It was not until four months after petitioner had arrived in the United States did he file an application for permanent resident pursuant to 8 U.S.C. §1255 (1980). Petitioner at that time changed his mind to stay here.

Findings of facts relating to discretionary relief should be supported by substantial evidence. *Hamad v. INS*, 420 F. 2d 645 (D.C. 1969); *Jarecha v. INS*, 417 F. 2d 220 (5th Cir. 1969) and findings relating to intentional nondisclosure or fraud should be sustained by clear and convincing evidence. *Castaneda-Gonzales v. INS*, 564 F. 2d 417 (D.C. Cir. 1977). Neither criteria supports a finding of intentional nondisclosure or fraud by petitioner.

(b) There is no evidence to support that petitioner intentionally deserted his ship in 1968. He testified that he got lost and unintentionally missed his ship. He remained in the United States until 1972. The facts that he voluntarily surrendered himself to the Immigration and Naturalization Service and bought his own air ticket to go back to Hong Kong have been considered mitigating factors in the application for permanent resident status. Furthermore, there cannot be an adverse inference from mere overstaying in the United States, *Marino v. INS*, 537 F. 2d 686 (2d Cir. 1976). Nor can there be an adverse inference from illegal or unauthorized employment prior to January 1, 1977. *Matter of Lam*, Interim Dec. 2628 (B.I.A. 1978). Here the Attorney General failed to consider all relevant factors including the facts that petitioner's services are in short supply and are needed in the United States and his length of residence here — more than ten years — factors normally evaluated in considering discretionary relief. Since the Board of Immigration Appeals erroneously evaluated the factors considered relevant for discretionary relief and failed to consider all relevant factors, the denial of petitioner's adjustment of status for permanent resident should be set aside. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Wang v. INS*, 413 F. 2d 286 (9th Cir. 1969); *Wong Wing Hang v. INS*, 360 F. 2d 715 (2d Cir. 1966); *Rassano v. INS*, 492 F. 2d 220 (7th Cir. 1974); *United States ex rel. Partheniades v. Shaughnessy*, 146 F. Supp. 772 (D.C. S.D.N.Y. 1956); *Chaunt v. United States*, 364 U.S. 850 (1960).

II.

The Attorney General has abused his discretion when he failed to consider all relevant factors for adjustment application and made a decision without a rational explanation.

Judge Friendly stated the standard as follows:

> "Without essaying comprehensive definition, we think the denial of suspension (of deportation) to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or in Judge Learned Hand's words, on other 'consideration that Congress could not have intended to make relevant'." *Wong Wing Hang v. INS*, 360 F. 2d 725, 719 (2d Cir. 1966).

(a) Petitioner's childhood name is Sing Chan and he later used the name Wing Ding Chan. There is a lack of information or evidence that petitioner assumed aliases for a fraudulent or improper purpose. *United States ex rel. Leibowitz v. Schoetfeld,* 94 F. 2d 263 (2d Cir. 1938). There is "nothing in the law prohibiting a person from taking or assuming another name" so long as it is not for a fraudulent purpose. 57 *Am. Jur.* 2d §22 p. 228. It was error to find that petitioner assumed a different name and draw an adverse inference therefrom without weighing all the relevant facts.

(b) The statute, 8 U.S.C. §1255 (1980), does not make adjustment of status to permanent resident dependent on alien's state of mind at the time of applying for admission to this country as a nonimmigrant. The use of this factor "preconceived

intent to remain here permanently" has been engrafted upon the statute by the administrative decisions and by conflicting judicial decisions. *Soo Yuen v. INS,* 456 F. 2d 1107 (9th Cir. 1972); *Chen v. Foley,* 385 F. 2d 929 (6th Cir. 1967), *cert. denied,* 393 U.S. 838 (1968); *Ameeriar v. INS,* 483 F. 2d 1029 (3rd Cir.), *cert. dismissed,* 404 U.S. 801 (1971).

In exercising the discretion, the Attorney General must consider the full factual record and due consideration must be given to the presence or absence of special equities, *Santos v. INS,* 375 F. 2d 262 (9th Cir. 1967).

In view of the erroneous findings of the Attorney General and its failure to evaluate all relevant factors, the denial of adjustment of status should be set aside. *Wang v. INS,* 413 F. 2d 286 (9th Cir. 1969); *Rossano v. INS,* 492 F. 2d 220 (7th Cir. 1974). Moreover, in the absence of adverse factors, adjustment of status should be granted. *Matter of Arari,* 13 I. & N. Dec. 494 (B.I.A. 1970).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

s/ Winston W. Tsai
Attorney for Petitioner

OPINION OF THE COURT OF APPEALS DATED AUGUST 4, 1980

United States Court of Appeals
For the District of Columbia Circuit

No. 79-1254

WING DING CHAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review of an Order of the Immigration and Naturalization Service

Argued January 16, 1980

Decided August 4, 1980

Mark A. Mancini, with whom *Jack Wasserman* was on the brief, for petitioner.

Eric A. Fisher, Attorney, Department of Justice, with whom *Lauren S. Kahn,* Attorney, Department of Justice, was on the brief, for respondent.

Before:

ROBINSON AND MIKVA, *Circuit Judges,* and JUNE L. GREEN*, *United States District Judge* for the District of Columbia.

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* Sitting by designation pursuant to 28 U.S.C. §292(a).

Opinion of the Court of Appeals Dated August 4, 1980

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge:* Petitioner Wing Ding Chan (Chan) seeks review of an order of the Board of Immigration Appeals denying Chan's application for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255 (1976),[1] and directing his deportation from the United States for overstaying his nonimmigrant visa.[2] Conceding that he is deportable, Chan claims that the Board erred in making certain factual determinations and improperly exercised its discretion in rejecting his application for adjustment of status. Therefore, the sole issue before the court is whether the Board lawfully denied the adjustment application. We uphold the Board in its findings and in its exercise of discretion, and affirm the Board's decision.

I. BACKGROUND

Chan is a native of the People's Republic of China who has come to the United States at least twice. One of his visits was in

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1. Section 245(a) provides:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Chan's statutory eligibility for adjustment of status is not in doubt in this case.

2. *In re Wing Ding Chan,* File A15 999 828 (BIA Feb. 13, 1979).

April, 1968, as a crewman aboard a ship which docked at a California port. Chan disembarked on a temporary shore pass, but failed to return for the vessle's departure. Instead, he remained in the United States until February, 1972, supporting himself by working as a cook in Chinese restaurants. That employment was without the permission of the Immigration and Naturalization Service (INS) and, along with his continued unauthorized presence in this country, made Chan a candidate for deportation.[3] When the INS finally met up with Chan, he was granted voluntary departure for Hong Kong, *see* Section 244(e) of the Act, 8 U.S.C. §1254(e) (1976), thereby avoiding the stigma of deportation.

Chan's next visit to the United States began December 31, 1972, less than a year after he had left the country. The authority for his second entry was a three-month nonimmigrant, business visitor visa, which he had obtained from the American Consulate in Hong Kong. Shortly after his arrival, he secured an offer of employment from a Washington, D.C. restaurant. The restaurant submitted a request that Chan be certified by the Department of Labor as a Chinese specialty cook. This certification was issued in March, 1973. Chan then petitioned the INS for status as a permanent resident, based on his labor certification.

Two separate interviews with immigration officals ensued. The first interview was adjourned to allow Chan an opportunity

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3. Although Chan's shore visa is not in the administrative record before the court, we note that nonimmigrants have been found deportable for overstaying a crewman's visa, *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8th Cir. 1973), or for engaging in unauthorized employment. *E.G., Londono v. INS*, 433 F.2d 635 (2d Cir. 1970).

to obtain counsel. Chan returned with a friend who acted as his interpreter, and the interview resumed. During the course of the interview, an INS officer questioned Chan about his earlier visit to the United States, about his use of a fictitious name at that time, and about his failure to report that visit on his application for the three-month business visa. Chan acknowledged he had used a different name in connection with his previous stay in the United States. He also admitted that he had not noted his previous stay on his visa application, but claimed he had mentioned it orally to the consular official who had met with Chan concerning the visa. On July 23, 1975, Chan was interviewed a second time, again with an interpreter present. He acknowledged that he intended to stay in the United States permanently at the time he applied for his three-month business visa. Chan signed a statement declaring that the record of the interview was accurate and that he had answered the questions truthfully.

On April 8, 1976, Chan's application for adjustment of status was denied by the INS District Director for the District of Columbia because Chan was found to have procured his visa through misrepresentation. Chan was given until May 10, 1976, to leave the United States voluntarily. Chan did not leave and deportation proceedings began. On August 24, 1977, following a hearing and de novo consideration, an immigration judge declined to grant permanent resident status to Chan and directed that he voluntarily depart by December 8, 1977, or be deported. Chan appealed to the Board, but the Board affirmed the ruling of the immigration judge. After concluding that Chan "was correctly found deportable by evidence which is clear, convincing and unequivocal," the Board further determined, as a matter of discretion, that Chan should not be granted adjustment of status:

> We conclude that adjustment of status is not warranted. The absence of a criminal record and the fact that the respondent [Chan] may have complied with United States income tax requirements are not sufficient favorable factors to outweight the adverse evidence; 1) that he withheld information from the American Consul at the time he applied for a visa; 2) that as a crewman he had deserted his vessel while in the United States in 1968 and remained here illegally under a different name until his departure in 1972; and 3) that he has no family ties in the United States. Therefore, we will deny the respondent's application for adjustment of status in the exercise of discretion . . . Accordingly, the appeal will be dismissed.

Rec. 7. This appeal followed that decision.

As our recitation of the background of this case indicates, complications and time delays easily arise whenever the removal of an alien is sought. These proceedings began many years ago. Some seven years after Chan's visa expired, Chan is still residing in this country.

II. STANDARD OF REVIEW

There is no dispute that Section 245 makes the decision on permanent residence a matter within the discretion of the Attorney General.[4] The statute provides that an alien's status

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4. In accordance with Section 103 of the Act, 8 U.S.C. §1103 (1976), the Attorney General has delegated responsibility for Section 245 determinations to the Board. 8 C.F.R. §3.1(d)(1) (1980); *see Jarecha v. INS*, 417 F.2d 220, 223-24 (5th Cir. 1969).

"may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence." 8 U.S.C. §1255(a) (1976). Under the statutory scheme, adjustment of status is considered a matter of administrative grace, not mere statutory eligibility. *Elkins v. Moreno,* 435 U.S. 647, 667 (1978); *Ameeriar v. INS,* 438 F.2d 1028, 1030 (3d Cir.) (*en banc*), *cert. dismissed,* 404 U.S. 801 (1971). And since it is deemed to be "extraordinary relief," the alien bears the burden of convincing the decisionmaker to exercise its discretion favorably. *Jain v. INS,* 612 F.2d 683, 687 (2d Cir. 1979), *cert. denied,* 100 S. Ct. 2155 (1980).

Judicial review of discretionary administrative action is limited. As this court has pointed out in an analogous context, our review of the Board's decision is basically a two-step process: first, the Board's findings of facts upon which its exercise of discretion is grounded must pass the substantial evidence test and, second, the Board's exercise of discretion is governed by the much less demanding "abuse of discretion" standard. *Hamad v. INS,* 420 F.2d 645, 646-47 (D.C. Cir. 1969) (suspension of deportation proceeding under Section 243(h) of the Act); *accord, Jarecha v. INS,* 417 F.2d 220, 224-25 (5th Cir. 1969).

A. *Substantial Evidence*

Chan challenges the Board's factual findings as lacking sufficient evidentiary support. However, because we conclude that the Board's findings are supported by "reasonable, substantial, and probative evidence on the record considered as a whole," we are bound to accept them as correct. Section 106 of the Act, 8 U.S.C. §1105a (1976); *see Soo Yuen v. INS,* 456 F.2d 1107 (9th Cir. 1972). Although the legal question here touches

an alien's important interest in maintaining his residence in the United States, the court cannot turn the statutory standard of review into an obstacle course which the immigration authorities can never master.

In particular, Chan attacks the evidence underlying the Board's findings (1) that Chan withheld information when he applied for his visa and (2) that Chan had deserted his ship on his first trip to the United States. With respect to the first finding, there is sufficient evidence that Chan had, and failed to disclose, a preconceived intent to remain in the United States permanently when he applied for his temporary visa.[5] Such intent frequently has been deemed a critical factor in determining whether to grant adjustment of status. *See Jain v. INS, supra,* 612 F.2d at 688-89; *Von Pervieux v. INS,* 572 F.2d 114, 118 (3d Cir. 1978), and cases cited therein. Less than a year after Chan departed the United States, having remained here for almost four years without authorization, he applied for a temporary visa to return to the United States. The purpose of the trip was supposedly to drum up business for the trading company where he was employed. Yet both the District Director and the immigration judge found that Chan terminated his job before leaving Hong Kong. The basis for this finding is clearly established in Chan's responses to questions put to him at the second interview by an INS official:

> Q. Why did you quit your employment at the Trading Co.? A. I wanted to come to the U.S.

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5. The visa application form (FS-257a) in use at the time Chan applied for his three-month visa expressly noted: "United States law prohibits the issuance of a temporary visa to anyone who plans to remain there permanently or indefinitely. A person admitted to the United States with a temporary visa may engage only in the activities for which the visa is granted. A visitor may not work."

> Q. Why did you want to come to the U.S.? A. I wanted to come to the U.S. to get some ideas.
>
> Q. What ideas? A. I just wanted to see some things, the restaurant business.
>
> Q. What did you want to see about the restaurant business? A. I was cook, I wanted to see if I could open a restaurant here.
>
> Q. Did you want to remain here permantly [sic] in the U.S.? A. Yes.
>
> Q. Why did you quit a job where the owner helped you get a visa? A. I appreciate my boss for getting a visa but I wanted see things and get better in Hong Kong.
>
> Q. What do you mean by get better in Hong Kong? A. I liked the U.S. better than Hong Kong.

Rec. 90-91. Chan's stated desire to open a restaurant business in the United States further evinces a preconceived intent to remain permanently. His securing a labor certification shortly after his arrival in the country bolsters the view that he always intended to stay here. The combination of all these factors — Chan's prolonged unauthorized stay in the United States, ostensibly on business for a trading company, even though he quit the company before leaving Hong Kong; his express interest in opening a restaurant business in the United States; and his rapid

moves to secure employment and apply for permanent residence — is persuasive evidence that Chan intended to come to this country permanently, not for a three-month business trip.[6]

Chan, denying he had any preconceived intent to stay in the United States, claims he did not quit his job, but went on vacation because business was slow. He further claims that he did not fully understand the interpreter at the second interview because he spoke a different dialect. Before the immigration judge, Chan denied having made some of the answers quoted to him from the transcript of the interview.

Admittedly there are complications in any record where the person charged with that record suffers from a language barrier. That problem is present in virtually every immigration case, but the authorities in this case demonstrated appropriate concern and sensitivity to it. The initial interview was recessed so that Chan could obtain counsel. He returned with a friend as translator. At the second interview, an attorney was present as an observer. That attorney later testified on Chan's behalf at the deportation hearing, where Chan was also represented by

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6. In fact, this case closely resembles *Tuan v. INS*, 531 F.2d 1337 (5th Cir. 1976) (per curiam), in significant respects. In *Tuan*, the Fifth Circuit found that substantial evidence supported a finding that the nonimmigrant alien had a preconceived intent to remain in the United States. The evidence revealed that the alien entered the country on a business visitor's visa and sought a labor certification within one month of his arrival. In support of the labor certification, the alien submitted a letter of recommendation prepared by a Taiwan employer six months before the alien's arrival in the United States. Likewise, in the instant case, Chan applied for a labor certification less than two months after he arrived on a temporary business visa. Moreover, the letters of recommendation offered in support of Chan's application date back to December, 1971, fully two years before Chan entered the country on his business visa.

counsel. Chan signed a sworn statement certifying the accuracy of the transcript and the truthfulness of his answers.[7] Given these facts, Chan's current contention that he did not adequately comprehend what was being said is subject to doubt.

In essence, the question of whether Chan had a preconceived intent to remain in the United States permanently when he applied for his visa boils down to one of credibility. The immigration judge, who was in the best position to observe Chan's demeanor, found that Chan was less than forthright:

> I am very unhappy with the testimony that you have given. I observed your demeanor, and I don't feel that you are forthright in your testimony and I want to tell you right now that you are under oath. If you lie under oath, you are liable to go to jail, or get a prison fine.

Rec. 82. The judgment of the immigration judge with respect to the credibility of a witness is entitled to the greatest of deference by a reviewing court. The chariness that the courts exercise in this regard is perhaps best epitomized by *Yaldo v. INS*, 424 F.2d 501 (6th Cir. 1970). In reviewing a rescission of permanent

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7. The statement reads:

> I have read (or have had read to me) the foregoing statement, consisting of 3 pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true, and correct record of my interrogation on the date indicated by the above-mentioned officer of the Immigration and Naturalization Service. I have initaled each page of this statement (and the correction(s) noted on page(s)_____).
>
> /S/ Wing Ding Chan

resident status and order of deportation, the court refused to entertain an argument by the alien that his ex-wife's testimony was not believable. The court declared:

> This argument, however, goes to the weight of the evidence and the credibility of the witnesses and is not properly addressed to us. . . .
>
> . . . [W]e are not permitted to substitute our judgment for that of the Board or the Special Inquiry Officer with respect to the credibility of this testimony or the ultimate findings of fact based thereon.

424 F.2d at 503 (citations omitted). Chan's lack of credibility was established below. Thus, we are satisfied that the entire record reflects "reasonable, substantial, and probative evidence," 8 U.S.C. §1105a (1976), that Chan withheld a preconceived intent to remain in the United States permanently when he applied for his visa.[8]

As for the finding of desertion, Chan argues that there is no evidence to refute his testimony at the deportation hearing that he got lost and unintentionally missed his ship. This ignores several pieces of evidence, not the least of which is the fact that Chan made no effort to notify anyone that he had missed the

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8. Having thus decided that there is ample evidence to support the Board's finding that Chan withheld information from the American Consul at the time he applied for his business visa, we will not dwell on whether the record supports another INS claim that Chan also withheld a second piece of information — namely, that Chan failed to state in his visa application that he had been in the United States before on a seaman's visa. We do note that a consular memorandum provides some support for the INS claim, but our decision need not and does not rely on it.

boat, silently remaining in the United States for almost four years. In response to questions posed at the deportation hearing, Chan admitted that he did not attempt to contact either an agent of the steamship company or the INS after his ship sailed without him. Although "some Chinese" helped him get a restaurant job, Chan apparently did not seek their help in contacting his former employer or the immigration authorities. Chan avoided detection by the INS for four years. And finally, the following excerpt from the transcript of the first interview — an excerpt which Chan has not attacked as being faulty — provides additional support for the desertion finding:

> Q. Do you remember what date you jumped ship? A. April 2, 1968.
>
> Q. Where did you jump ship April 2? A. Sacremento [sic].
>
> Q. Previous to jumping ship had you been admitted to California as a crewman or were you detained on board ship? A. I had a temporary pass to go on shore.
>
> Q. Had you ever been to the U.S. before on a ship? A. I had been to the U.S. but I had never jumped ship before.

Rec. 134. While we do not deem Chan's statement that he "had never jumped ship before" to be an admission of desertion, the quoted excerpt provides some evidence of desertion. Viewed in conjunction with missing his ship's sailing, failing to contact the steamship company afterwards, and surreptitiously remaining in the United States for a period of years, it is clear that the finding that Chan deserted his ship is supported by "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. §1105a (1976).

B. *Exercise of Discretion*

Given the congressional commitment of discretionary authority to the Attorney General in Section 245, "the reviewing court is limited to an examination of the record to ascertain if that discretion has been abused. The Court may not substitute its judgment for that of the administrative agency." *Chen v. Foley,* 385 F.2d 929, 934 (6th Cir. 1967), *cert. denied,* 393 U.S. 838 (1968); *accord, Astudillo v. INS,* 443 F.2d 525 (D.C. Cir. 1971). However tempting it might be to stretch this reviewing authority because of the subject matter, it is for Congress to assign that responsibility, not for the courts to assert it. Judge Friendly described the standard in these words:

> Without essaying comprehensive definition, we think the denial of suspension [of deportation] to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant."

Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (citation omitted).

We find the Board's exercise of discretion was carried out in a manner which was not abusive. As quoted in part I, *supra,* the Board weighed the favorable and adverse factors and concluded that the balance tipped against granting adjustment of status. We perceive no ground for invalidating the Board's determination.

Clearly, Chan's concealed intent to remain in the United States permanently at the time he sought his visa may be deemed an adverse factor. In addition, this court has held that the Attorney General, in the exercise of his discretion, can properly consider an alien's lack of family ties in the United States. *See Melachrinos v. Brownell,* 230 F.2d 42 (D.C. Cir. 1956) (suspension of deportation proceeding); *accord, Soo Yuen v. INS, supra,* 456 F.2d at 1108 ("His lack of family ties in the United States is alone ground for denial of adjustment of status.").

Chan contends that the second adverse factor — that as a crewman he had deserted his vessel while in the United States in 1968 and remained here illegally under a different name until his departure in 1972 — should not have been considered as an adverse factor and that other positive factors were improperly ignored by the Board. We have already rejected Chan's claim that the Board erred in finding that Chan deserted his ship. Therefore, Chan's argument that an adverse inference cannot be drawn from "mere overstaying" is irrelevant. Chan's desertion is a factor separate and apart from merely overstaying a visa.[9] As

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9. Moreover, Chan's citation of *Marino v. INS,* 537 F.2d 686 (2d Cir. 1976), fails to convince us that mere overstaying can never be used as an adverse factor. In *Marino,* an alien who admitted his deportability as an overstay vistor petitioned the immigration authorities for adjustment of status. After initally granting the alien's petition, the immigration judge reversed his decision when further evidence indicated that the alien had "been convicted of a crime involving moral turpitude," making him an excludable alien under Section 212(a)(9) of the Immigration and Nationality Act and statutorily ineligible for adjustment of status under Section 245(a). 8 U.S.C. §§1182(a)(9), 1255(a) (1976). In reviewing the case, the Second Circuit determined that the alien had not been "convicted" of a crime within the meaning of the Act. Therefore, the court held that the alien should have been found statutorily

(Cont'd)

for Chan's use of a different name,[10] this was clearly not the key point of the Board's finding but, linked to Chan's desertion and four-year illegal stay in the United States, there is some evidence of improper purpose in the use of the name. Chan's reliance on *United States ex rel. Leibowitz v. Scholtfeld,* 94 F.2d 263 (2d Cir. 1938), is therefore inappropriate.

Finally, Chan claims that his length of residence in the United States and his labor certification should have been considered as favorable factors. The immigration authorities have labored for over seven years to carry out the mandate committed to them by Congress as it pertains to Chan. Now this delay is being urged as a further ground for granting Chan the extraordinary relief he seeks. We think such a bootstrap argument is meritless. It merely highlights the sluggishness of all institutions of government, including the courts, in effectuating the policy decision made by Congress. It is no more a ground for keeping Chan in this country than is his cooking talent, which

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(Cont'd)

eligible for Section 245 relief and remanded the case for the Attorney General to exercise his discretion in the matter. The court noted that "Marino was entitled to apply for adjustment of status to that of a permanent resident even though he had overstayed his visit." 537 F.2d at 693 n. 9. But nowhere does the court say that overstaying his visit cannot be considered as an adverse factor by the Attorney General in the exercise of discretion, and the case does not stand for that proposition. Rather, as the court continued, it simply means that "[i]f Marino's application for adjustment of status were granted in the Attorney General's discretion, his deportability for having overstayed his visit would be wiped out." *Id.* (citation omitted).

10. Chan admits that he used the name "Chow Wing Ting" on immigration papers when he departed the United States in 1972, but claims that it is a phonetic spelling of "Chan Wing Ding."

the immigration judge found was acquired while Chan was illegally in the United States.[11]

Congress is the body charged with establishing our nation's policies pertaining to the entry of aliens and their right to remain here. "[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press,* 347 U.S. 522, 531 (1954); *accord, Kleindienst v. Mandel,* 408 U.S. 753, 766-67 (1972). In the Immigration and Nationality Act, Congress gave discretionary authority to the Attorney General to make adjustment of status determinations. The determination in Chan's case is adequately substantiated by the record and properly reasoned in its analysis. All parties concerned should be uncomfortable that the fulfillment of Congress' policy has proceeded at such a deliberate pace.

Affirmed.

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11. The immigration judge found that "[t]he labor certification in support of [Chan's] application was granted on the basis of experience gained solely while unlawfully in the United States. No experience as a cook was gained abroad prior to his entry into the United States." Rec. 54. A subsequent affidavit suggests Chan may have had some prior cooking experience, but it fails to persuade us that the Board erred in not treating the labor certification as a positive factor.

OPINION OF THE BOARD OF IMMIGRATION APPEALS DATED FEBRUARY 13, 1980

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals
Washington, D.C. 20530
Feb. 13, 1979

File: A15 999 828 — Washington, D.C.

In re: WING DING *CHAN*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Morgan E. Thomas, Esquire
One New York Avenue
Atlantic City, N.J. 08401

ON BEHALF OF I&N SERVICE:

George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT:

April 3, 1978

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))- Visitor - remained longer than permitted

Opinion of the Board of Immigration Appeals Dated February 13, 1980

APPLICATION: Permanent resident status under section 245, Immigration and Nationality Act, 8 U.S.C. 1255

In a decision dated August 24, 1977, the immigration judge found the respondent deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), ordered his deportation, denied his renewed application for adjustment of status under section 245 of the Act, 8 U.S.C. 1255, and granted him voluntary departure in lieu of deportation to Hong Kong. The respondent has appealed from that decision. The appeal will be dismissed.

The 35-year-old married male is a native of, and claims to be a citizen of, the People's Republic of China. He last entered the United States on December 31, 1972 as a nonimmigrant visitor, who was authorized to remain in the United States until March 31, 1973. In view of the fact that he admitted the allegations in the amended Order to Show Cause and conceded deportability, he was correctly found deportable by evidence which is clear, convincing and unequivocal. At issue on appeal is the denial of his application under section 245 of the Act as a matter of discretion.

The respondent initially filed an application for adjustment of status in April 1973. His application was supported by a labor certification for employment by Am-Chi Restaurant in Washington, D.C., as a Chinese specialty cook. This certified job offer, which was forwarded to the Service, shows a nonpreference priority date of March 7, 1973 in accordance with 8 C.F.R. 245.1(g)(2)(iv). A nonpreference visa was available on that date (see Department of State Bulletin, Vol. II. No. 61). That application for adjustment of status was denied by the District Director on April 8, 1976, on the ground that the

respondent had a preconceived intent to remain permanently in the United States and that he had a procured a nonimmigrant visa on December 29, 1972 by fraud and willful misrepresentation of material facts. The District Director also related that he failed to inform the American Consul in Hong Kong that as a crewman he had deserted his ship in April 1968; that he was apprehended by the Service; and that he was granted voluntary departure and so departed the United States on February 8, 1972. The record further indicates that in a letter to the District Director, dated May 5, 1976, the respondent stated that he was renewing his application for status.

The record also contains a sixth preference visa petition submitted on December 30, 1976. That petition was supported by a labor certification for employment by Southern Pigs Barbecue Restaurant in Springfield, Virginia, as a Chinese specialty cook. This certified job offer, which was forwarded to the Service, shows a sixth preference priority date of October 21, 1976. A sixth preference visa was available on that date (see Department of State Bulletin, Vol. II, No. 106).

At the respondent's hearing conducted on January 10, 1977, he submitted an application for adjustment of status. The immigration judge treated it as a renewed application. (Tr. p. 10). Although the immigration judge found the evidence of record insufficient to establish fraud or willful misrepresentation, he denied the application as a matter of discretion. On appeal, the Service contends that the record establishes that the respondent is barred from adjusting his status by section 245(c) of the Act, 8 U.S.C. 1255(c). Contrariwise, the respondent contends that the statutory bar of unauthorized employment does not apply since he had an application on file for adjustment prior to his employment.

Opinion of the Board of Immigration Appeals Dated February 13, 1980

Section 245(a) of the Act, 8 U.S.C. 1255(a), states:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 245(c) of the Act, 8 U.S.C. 1255(c), as amended by Pub. L. 94-571, 90 Stat. 2703, effective January 1, 1977, states:

> The provisions of this section shall not apply to . . . (2) an alien (other than an immediate relative as defined in section 201(b)) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status. . . .

In *Matter of Huang,* Interim Decision 2616 (BIA 1978), a case involving facts similar to the facts in this case, we held that, the resubmission of an application for adjustment of status before an immigration judge under 8 C.F.R. 245.2(a)(4), does not constitute a new filing. In *Huang,* supra, the applicant submitted his investor claim to the District Director and then to the immigration judge. In this case however, the respondent initially supported his application for status on the grounds of a

nonpreference visa petition with a priority date of March 7, 1973, then later supported his application for status on the basis of a sixth preference visa petition with a priority date of October 21, 1976. Therefore, his present application for status supported by his sixth preference visa petition with a priority date of October 21, 1976 does not support a finding that the application to the immigration judge is a continuation of a 1973 application to the District Director. Consequently, we find that the second application constitutes a new filing. Nevertheless, we conclude that the respondent, apparently employed after January 1, 1977, is not precluded by section 245(c) of the Act from receiving an adjustment of status. Our conclusion is predicated upon a telegraphic instruction issues by the Deputy Commissioner of the Service on July 18, 1977 which grants *nunc pro tunc* employment authorization to persons such as the respondent who have had visa petitions filed in their behalf prior to January 10, 1977, and who could, under 8 C.F.R. 245.2(a)(2), have properly filed an application for adjustment with that visa petition. Inasmuch as the respondent is the beneficiary of a sixth preference petition filed on December 30, 1976, and who renewed his application for status at the hearing on January 10, 1977, that instruction of July 18, 1977, would have given *nunc pro tunc* authorization for his employment. The respondent, therefore, would not be precluded by section 245(c) from receiving adjustment of status. *Matter of Cheng,* Interim Decision 2623 (BIA 1977); *Yang v. INS,* 574 F.2d 171 (3 Cir. 1978).

Section 245 of the Act reposes with the Attorney General and his delegates the discretionary power to grant an adjustment of status, *Bagamasbad v. INS,* 427 U.S. 24 (1976); *Thomaidis v. INS,* 431 F.2d 711 (9 Cir. 1970), *cert. denied* 401 U.S. 954 (1971); *Matter of Arai,* 13 I&N Dec. 494 (BIA 1970).

Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. *Hintopoulos v. Shaughnessy,* 353 U.S. 72 (1957); *Ameeriar v. INS,* 438 F.2d 1028 (3 Cir. 1971). Thus, an applicant who meets the objective prerequisites is merely eligible for adjustment of status; he is in no way entitled to such relief. *Jarecha v. INS,* 417 F.2d 220 (5 Cir. 1969); *Chen v. Foley,* 385 F.2d 929 (6 Cir. 1967), *cert. denied* 393 U.S. 838 (1968). The burden of proof is upon the respondent to establish not only that he meets all statutory requirements for eligibility but also that he is worthy of the exercise of discretion in his favor. 8 C.F.R. 242.17(d); *Ameeriar, supra; Thomaidis, supra.* Since the adjustment of status of an alien is an extraordinary relief, it should be granted only in meritorious cases. *Ameeriar, supra; Chen, supra.* Moreover, the exercise of discretion in a particular case necessarily requires a consideration of all the facts and circumstances involved. In *Matter of Arai,* 13 I&N Dec. 494 (BIA 1970), we held that where adverse factors are present in a given application, it may be necessary for the applicant to offset these factors by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. Accord, *Matter of Blas,* Interim Decision 2485(BIA 1974; A.G. 1976); *Matter of Hui,* Interim Decision 2378 (BIA 1975); *Matter of Allotey,* Interim Decision 2398 (BIA 1975). In *Matter of Blas, supra,* the Attorney General held that a respondent's affirmative equities must be sufficient to overcome the adverse impact of his past misconduct.

We conclude that adjustment of status is not warranted. The absence of a criminal record and the fact that the respondent may have complied with United States Income tax

requirements are not sufficient favorable factors to outweigh the adverse evidence; 1) that he withheld information from the American Consul at the time he applied for a visa; 2) that as a crewman he had deserted his vessel while in the United States in 1968 and remained here illegally under a different name until his departure in 1972; and 3) that he has no family ties in the United States. Therefore, we will deny the respondent's application for adjustment of status in the exercise of discretion. *Matter of Blas, supra.* Accordingly, the appeal will be dismissed.

The immigration judge granted the respondent a period of 106 days in which to voluntarily depart the United States. We have held that in those cases in which a period exceeding 30 days has been granted, the respondent will be given 30 days from the date of our decision in which to depart voluntarily. See *Matter of Chouliaris,* Interim Decision 2572 (BIA 1977).

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

DECISION OF THE IMMIGRATION JUDGE DATED AUGUST 24, 1977

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

FILE: A15 999 828

In The Matter of:

Wing Ding CHAN

RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act — Section 241(a)(2) — Visitor, remained longer

APPLICATION: Adjustment of status to permanent resident

ON BEHALF OF RESPONDENT:

Winston W. Tsai
1028 Connecticut Avenue, NW
Washington, D.C. 20036

ON BEHALF OF SERVICE:

Ernest H. Hupp
Trial Attorney
Washington, D.C.

Respondent is a native and citizen of China who admits as Order to Show Cause alleges, that he entered the United States

at San Francisco on or about December 31, 1972 at which time he was admitted as a visitor for business and authorized to remain until March 31, 1973.

On April 23, 1973, he filed an application to adjust his status to a legal permanent resident under Section 245 of the Immigration and Nationality Act, which was denied on April 8, 1976 (Exhibit three). He was thereafter advised to depart on or before May 10, 1976 which he failed to do.

Respondent admitted as charged under section 241(a)(2) of the Immigration and Nationality Act, in that after admission as a nonimmigrant under section 101(a)(15) of said Act, he remained in the United States for a longer time than permitted.

At the deportation hearing he renewed his application for adjustment of status to permanent residence. I am not bound by the decision of the District Director and will consider de novo his application.

Respondent first arrived in the United States as a crewman in April, 1968 and remained until February, 1972, after having been granted voluntary departure by the Service.

On December 29, 1972, he was granted a visa as a visitor for business by the American Consul in Hong Kong. Exhibit six of these proceedings, a memorandum from the American Consul, Hong Kong, indicates that the respondent in his application stated he had never applied for a visa before. The respondent claims he was assisted in his application by a friend and did not know what he signed. He also presented letters to the the consul that he was employed by Hang Cheong Trading Company but terminated this employment before he obtained his visa. Shortly

after arrival into the United States on December 31, 1972, as a visitor for business, he secured employment on February 21, 1973 with the Am-Chi Restaurant in Washington, D.C.

Another application to adjust status to permanent resident was filed December 30, 1976 and denied on April 8, 1976 by the District Director, (Exhibit 3). I am not bound by the decision of the District Director, and have considered the respondent's application for adjustment of status de novo.

The labor certification in support of his application was granted on the basis of experience gained solely while unlawfully in the United States. No experience as a cook was gained abroad prior to his entry into the United States.

With respect to fraud, the testimony of the subject is that his application for the visa was completed by a friend and the respondent never appeared personally at the American Consulate. The evidence of record is not sufficient to justify a charge of fraud or willful misrepresentation.

In determining whether or not adjustment of status should be granted as a matter of discretion, the facts of the case both favorable and unfavorable must be considered. Unfavorable is his original testimony that he intended to remain in the United States permanently. Also, shortly after arrival he secured a position and commenced employment. Additionally, the experience upon which the labor certification was granted was obtained while illegally in the United States. He has no ties in the United States.

Favorable to the respondent is the fact that he does not have any criminal record, and that he has paid income taxes while in the United States.

Decision of the Immigration Judge Dated August 24, 1977

I find that the unfavorable factors out weigh the favorable factors, and the application for adjustment of status is denied as a matter of discretion.

ORDER: IT IS ORDERED that the application for adjustment of status under Section 245 of the immigration and Nationality Act filed December 30, 1976 be and the same is hereby denied as a matter of discretion.

IT IS FURTHER ORDERED that in lieu of an order of deportation, respondent be granted voluntary departure without expense to the Government on or before December 8, 1977, or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice of proceedings, and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Hong Kong on the charges contained in the Order to Show Cause.

s/ Emil M. Bobek
Immigration Judge

DECISION OF THE DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE DATED APRIL 8, 1976

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
1025 Vermont Avenue, N.W.
Washington, D.C. 20538

A15 999 828

Wing Ding Chan
507 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

SEE ATTACHMENT

You are granted to May 10, 1976 to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. You must notify this office before that date on the enclosed card (Form I-438) of the arrangements you have made to depart from the United States. *At the time of your departure from the United States, do not fail to surrender Form I-94, Arrival-Departure Record, in accordance with the instructions on that form.*

If you fail to depart from the United States by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings.

Decision of the District Director, Immigration and Naturalization Service Dated April 8, 1976

Sincerely yours,

s/ David L. Drummond
District Director

Enclosure(s)
xx I-438
xx I-94

Decision of the District Director, Immigration and Naturalization Service Dated April 8, 1976

The record discloses that you first arrived in the United States as a crewman aboard the M/V Oriental Importer on April 1, 1968 and deserted that ship in Sacramento, California. You subsequently, took several jobs as a cook of Chinese food. On February 8, 1972 you departed the United States after you had been granted voluntary departure by this Service.

On December 29, 1972 you were issued a B-1/B-2 nonimmigrant visa by the American Consul in Hong Kong. You had to make several trips to the consulate in order to obtain that visa because the consular officer was not convinced of your true intentions. You enlisted the aid of your then employer, the owner of the Hang Cheong Trading Company, You first applied for the visa on or about December 11, 1972. Just before you received your visa you terminated your employment with the Hang Cheong Trading Company. That was on December 18, 1972.

You were admitted to the United States on December 31, 1972 as a visitor for business. By February 21, 1973 you had secured an offer of employment with the Am-Chi Restaurant in Washington, D.C. On March 22, 1973 a labor certification was issued to you by the Department of Labor.

You stated under oath to an officer of this Service that you wanted to come to the United States to see about the restaurant business and to see if you could open a restaurant here in the United States. You also stated that you came here because you wanted to remain permanently in the United States.

From the foregoing, it is concluded that you willfully misrepresented material facts to the United States Consul when you obtained your visa. You failed to inform the Consul of your apprehension as a crewman who deserted his ship and who was

Decision of the District Director, Immigration and Naturalization Service Dated April 8, 1976

granted voluntary departure. You failed to inform the Consul that you wished to remain in the United States permanently and therefore were an intended immigrant.

You are among those classes of aliens ineligible to receive visas as found in Section 212(a)(19) of the Immigration and Nationality Act, as amended, in that you did in fact procure your nonimmigrant visa by fraud and willful misrepresentation of material facts and that you had a preconceived intent to remain permanently in the United States.

Careful consideration has been given to your application and in view of the facts related above, your application must be and is hereby denied.

Attachment to Form I-291 dated Apr. 8, 1976.